

Jan 07, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JUDY P.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

No. 1:18-CV-03219-RHW

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 12, 14. Plaintiff brings this action seeking judicial review, pursuant to 42 U.S.C. § 405(g), of the Commissioner of Social Security's final decision, which denied her application for Social Security Disability Insurance under Title II of the Social Security Act, 42 U.S.C. §§ 401-434. After reviewing the administrative record and briefs filed by the parties, the Court is now fully informed. For the

¹Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant and directs the Clerk to update the docket sheet. *See* Fed. R. Civ. P. 25(d).

1 reasons set forth below, the Court **GRANTS in part** Plaintiff's Motion for
2 Summary Judgment, **DENIES** Defendant's Motion for Summary Judgment, and
3 **REMANDS** the matter to the Commissioner for additional proceedings.

4 **I. Jurisdiction**

5 Plaintiff filed her application for Social Security Disability Insurance on
6 February 22, 2014. AR 251. She alleged a disability onset date of April 1, 2010.
7 AR 494. Plaintiff's application was initially denied on April 25, 2014, AR 278-88,
8 and on reconsideration on September 24, 2014, AR 299-303.

9 Administrative Law Judge ("ALJ") Tom L. Morris held hearings on April
10 12, 2016, January 31, 2017, and August 24, 2017 and heard testimony from
11 Plaintiff, vocational expert Leta Berkshire, vocational expert Thomas Polsin, and
12 medical expert Minh Vu, M.D. AR 144-245. At the August 24, 2017 hearing,
13 Plaintiff amended her date of onset to December 1, 2015. AR 209. On September
14 28, 2017, the ALJ issued a decision finding Plaintiff ineligible for disability
15 benefits. AR 56-71. The Appeals Council denied Plaintiff's request for review on
16 September 19, 2018. AR 1-5. Plaintiff sought judicial review by this Court on
17 November 19, 2018. ECF No. 1. Accordingly, Plaintiff's claims are properly
18 before this Court pursuant to 42 U.S.C. § 405(g).

19 **II. Sequential Evaluation Process**

20 The Social Security Act defines disability as the "inability to engage in any

1 substantial gainful activity by reason of any medically determinable physical or
2 mental impairment which can be expected to result in death or which has lasted or
3 can be expected to last for a continuous period of not less than twelve months.” 42
4 U.S.C. § 423(d)(1)(A).

5 The Commissioner has established a five-step sequential evaluation process
6 for determining whether a claimant is disabled within the meaning of the Social
7 Security Act. 20 C.F.R. § 404.1520(a)(4); *Lounsbury v. Barnhart*, 468 F.3d 1111,
8 1114 (9th Cir. 2006). In steps one through four, the burden of proof rests upon the
9 claimant to establish a prima facie case of entitlement to disability benefits. *Tackett*
10 *v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999). This burden is met once the
11 claimant establishes that physical or mental impairments prevent her from
12 engaging in her previous occupations. 20 C.F.R. §§ 404.1520(a). If the claimant
13 cannot engage in her previous occupations, the ALJ proceeds to step five and the
14 burden shifts to the Commissioner to demonstrate that (1) the claimant is capable
15 of performing other work; and (2) such work exists in “significant numbers in the
16 national economy.” 20 C.F.R. § 404.1560(c)(2); *Beltran v. Astrue*, 700 F.3d 386,
17 388-89 (9th Cir. 2012).

18 III. Standard of Review

19 A district court’s review of a final decision of the Commissioner is governed
20 by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited, and the

1 Commissioner's decision will be disturbed "only if it is not supported by
2 substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
3 1158-59 (9th Cir. 2012) (citing § 405(g)). Substantial evidence means "more than a
4 mere scintilla but less than a preponderance; it is such relevant evidence as a
5 reasonable mind might accept as adequate to support a conclusion." *Sandgathe v.*
6 *Chater*, 108 F.3d 978, 980 (9th Cir. 1997) (quoting *Andrews v. Shalala*, 53 F.3d
7 1035, 1039 (9th Cir. 1995)) (internal quotation marks omitted). In determining
8 whether the Commissioner's findings are supported by substantial evidence, "a
9 reviewing court must consider the entire record as a whole and may not affirm
10 simply by isolating a specific quantum of supporting evidence." *Robbins v. Soc.*
11 *Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (quoting *Hammock v. Bowen*, 879
12 F.2d 498, 501 (9th Cir. 1989)).

13 In reviewing a denial of benefits, a district court may not substitute its
14 judgment for that of the ALJ. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir.
15 1992). If the evidence in the record "is susceptible to more than one rational
16 interpretation, [the court] must uphold the ALJ's findings if they are supported by
17 inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104,
18 1111 (9th Cir. 2012); *see also Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
19 2002). Moreover, a district court "may not reverse an ALJ's decision on account of
20 an error that is harmless." *Molina*, 674 F.3d at 1111. An error is harmless "where it

1 is inconsequential to the [ALJ's] ultimate nondisability determination.” *Id.* at 1115.

2 The burden of showing that an error is harmful generally falls upon the party
3 appealing the ALJ's decision. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

4 **IV. Statement of Facts**

5 The facts of the case are set forth in detail in the transcript of proceedings
6 and only briefly summarized here. Plaintiff was 51 years old at the amended date
7 of onset. AR 494. At application, the alleged conditions limiting her ability to work
8 included stage III chronic kidney disease, cardiovascular surgical bypass, diabetic
9 insulin dependent over 40 years, retinopathy surgical laser procedures, peripheral
10 neuropathy in all extremities, depression gastroparesis, asthma, GERD, and thyroid
11 disorder. AR 518. Plaintiff completed high school in 1982. AR 519. At the time of
12 application, Plaintiff stated she had past work in accounting. AR 519.

13 **V. The ALJ's Findings**

14 The ALJ determined that Plaintiff was not under a disability within the
15 meaning of the Act from the amended date of onset, December 1, 2015, through
16 the date last insured, December 31, 2015. AR 56-71.

17 **At step one**, the ALJ found that Plaintiff had not engaged in substantial
18 gainful activity since the amended date of onset, December 1, 2015, through the
19 date last insured, December 31, 2015. AR 59 (citing 20 C.F.R. § 404.1571 *et seq.*).

20 **At step two**, the ALJ found that Plaintiff had the following severe

1 impairments: ischemic heart disease/coronary artery disease, diabetes mellitus,
2 peripheral neuropathy (including carpal tunnel syndrome), and left middle trigger
3 finger (citing 20 C.F.R. § 404.1520(c)). AR 59.

4 **At step three**, the ALJ found that Plaintiff did not have an impairment or
5 combination of impairments that meets or medically equals the severity of one of
6 the listed impairments in 20 C.F.R. § 404, Subpt. P, App. 1. AR 62 (citing 20
7 C.F.R. §§ 404.1520(d), 404.1525, and 404.1526).

8 **At step four**, the ALJ found Plaintiff had the residual functional capacity to
9 perform work with the following limitations:

10 [T]he claimant had the residual functional capacity to lift and carry ten
11 pounds occasionally and frequently. She could stand and/or walk (with
12 normal breaks) for a total of two hours in an eight-hour workday. She
13 could sit (with normal breaks) for a total of six hours in an eight-hour
14 workday. She could never kneel, crouch, crawl, or climbing ladders,
15 ropes, or scaffolding. She could occasionally stoop and climb ramps
16 and stairs. She could frequently balance. She needed to avoid
concentrated exposure to wetness, humidity, extreme temperatures,
pulmonary irritants, or hazards. She could frequently finger with her
left hand. She could frequently handle bilaterally. She was not able to
perform at a production rate pace (e.g. assembly line work where pace
is mechanically controlled) but could perform goal-oriented work. She
would have been off-task up to ten percent of her eight-hour workday.

17 AR 64-65. The ALJ found Plaintiff had past relevant work as an accounting clerk
18 and she was able to perform this past relevant work. AR 71.

19 **VI. Issues for Review**

20 Plaintiff argues that the Commissioner's decision is not free of legal error

1 and not supported by substantial evidence. Specifically, she argues that the ALJ
2 erred by: (1) failing to make a proper step two determination; (2) failing to
3 properly weigh the medical opinions; (3) failing to properly consider Plaintiff's
4 symptom statements; and (4) failing to make a proper step four determination.

5 **VII. Discussion**

6 **A. Step Two**

7 Plaintiff challenges the ALJ's step two determination by asserting that he
8 failed to properly consider Plaintiff's kidney disorder, diabetic retinopathy, and
9 gastrointestinal (GI) disorders. ECF No. 12 at 4-9.

10 Step two addresses whether the claimant has a severe impairment, or
11 combination of impairments, that significantly limits the claimant's physical or
12 mental ability to do basic work activities. 20 C.F.R. § 404.1520(a)(4)(ii). To
13 establish a severe impairment at step two, the claimant must first establish the
14 existence of a medically determinable impairment by providing medical evidence
15 consisting of signs, symptoms, and laboratory findings; the claimant's own
16 statement of symptoms, a diagnosis, or a medical opinion is not sufficient to
17 establish the existence of an impairment. 20 C.F.R. § 404.1521. "[O]nce a claimant
18 has shown that [she] suffers from a medically determinable impairment, [she] next
19 has the burden of proving that these impairments and their symptoms affect [her]
20 ability to perform basic work activities." *Edlund v. Massanari*, 253 F.3d 1152,

1 1159-60 (9th Cir. 2001). At step two, the burden of proof is on the Plaintiff to
2 establish the existence of any medically determinable impairment(s) and that such
3 impairments(s) are severe. *Tackett*, 180 F.3d at 1098-99.

4 The step-two analysis is “a de minimis screening device used to dispose of
5 groundless claims.” *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005). An
6 impairment is “not severe” if it does not “significantly limit” the ability to conduct
7 “basic work activities.” 20 C.F.R. § 404.1522(a). Basic work activities are
8 “abilities and aptitudes necessary to do most jobs.” 20 C.F.R. § 404.1522(b).

9 **1. Kidney Disorder**

10 The ALJ found that Plaintiff’s kidney disorder was a medically determinable
11 impairment, but found that it was not severe, stating it “did not cause functional
12 limitations through the end of 2015.” AR 60. However, this finding is not
13 supported by substantial evidence. At the August 24, 2017 hearing, Dr. Vu testified
14 that Plaintiff’s chronic kidney disease was a severe medically determinable
15 impairment as of December 2015. AR 215-17, 233. Dr. Vu pointed out a creatine
16 range up to 1.3 in April 2015 and a glomerular filtration rate (GFR) of 39
17 milliliters per minute in March 2016, stating that this equaled a 50% function of
18 the kidney. AR 216-17. He explained that once the kidney function gets down to
19 50% of normal, Plaintiff would have less stamina to work. AR 226.

20 The Court acknowledges that the GFR score Dr. Vu referenced in his

1 testimony and associated with Plaintiff's reduced kidney function is after the date
2 last insured. However, other evidence in the record indicates Plaintiff had a low
3 GFR score prior to the date last insured. In January 2012, Plaintiff had a creatinine
4 level of 1.2 and an estimated GFR of 54. AR 870. On July 29, 2013, Plaintiff had a
5 creatinine level ranging from 1.10 to 1.42 and a GFR ranging from 42 to 46. AR
6 613. On November 4, 2013, Plaintiff had a creatinine level of 1.27 and an
7 estimated GFR of 45. AR 684. In August 2014, Plaintiff had a creatinine level of
8 1.13 and a GFR of 51.17. AR 733, 738. Dr. Vu reviewed these test results and
9 clearly identified Plaintiff's chronic kidney disease as a severe medically
10 determinable impairment prior to the date last insured. AR 233. Therefore, the
11 ALJ's determination that Plaintiff's chronic kidney disease is not severe is not
12 supported by substantial evidence.

13 The case is remanded for the ALJ to make a new step two determination
14 addressing Plaintiff's chronic kidney disease.

15 **2. Diabetic Retinopathy**

16 The ALJ failed to discuss Plaintiff's diabetic retinopathy in his decision, and
17 did not include any vision limitations within the residual functional capacity. AR
18 59-62, 64-65. The Court acknowledges that the vision testing in the record that
19 establishes Plaintiff's diabetic retinopathy occurred after the date last insured. AR
20 994 (August 2, 2016 exam showing severe diabetic retinopathy). However, since

1 the case is being remanded for the ALJ to make a new step two determination, the
2 ALJ shall readdress Plaintiff's diabetic retinopathy and any evidence it was present
3 prior to the date last insured.

4 **3. GI Disorders**

5 The ALJ found that Plaintiff's GI disorders were medically determinable,
6 but did not cause any functional limitations and were not severe. AR 60.

7 At the August 24, 2017 hearing, Dr. Vu testified that Plaintiff's
8 "gastrointestinal or GERD" was a severe medically determinable impairment as of
9 December 2015. AR 233. However, he had previously stated that there were no
10 objective findings for the diagnosis of gastrointestinal reflux disease. AR 220-21.
11 This is conflicting testimony. The ALJ is responsible for resolving conflicts in
12 medical testimony and resolving ambiguities. *Andrews*, 53 F.3d at 1039. Therefore,
13 upon remand, the ALJ shall readdress all of Plaintiff's step two alleged
14 impairments, including her alleged GI disorders.

15 **B. Medical Opinions**

16 Plaintiff challenges the weight the ALJ gave to the opinions of Glenda
17 Petrie, ARNP, Guillermo Rubio, M.D., and Olegario Ignacio, Jr., M.D. ECF No. 12
18 at 9-14.

19 **1. Glenda Petrie, ARNP**

20 On March 29, 2016, Nurse Petrie completed a Medical Questionnaire, in

1 which she indicated: “I do not believe that this patient is capable of performing any
2 type of work on a reasonably continuous, sustained basis (e.g., eight hours a day,
3 five days a week, or approximately 40 hours per week consistent with a normal
4 work routine).” AR 806. When asked to specify the primary medical diagnosis for
5 the opinion, she stated: “Due to the duration of type – 1 diabetes (45 yrs) and all
6 the complications associated [with] her diabetes, Judy is not able to maintain
7 gainful employment.” *Id.* The ALJ gave these statements “minimal weight” for
8 three reasons: (1) it was a “cursory statement of disability without any supporting
9 evidence”; (2) it was “wholly based” on Plaintiff’s subjective reporting; and (3) it
10 was unclear if the opinion took into account Plaintiff’s lack of compliance with
11 diabetic treatment recommendations. AR 69.

12 Generally, the ALJ should give more weight to the opinion of an acceptable
13 medical source than to the opinion of an “other source.” 20 C.F.R. § 404.1527. For
14 applications filed before March 27, 2017, Nurse Practitioners do not qualify as
15 acceptable medical sources. 20 C.F.R. § 404.1502(a)(7). An ALJ is required,
16 however, to consider evidence from “other sources” who are not acceptable
17 medical sources, 20 C.F.R. § 404.1527(f), “as to how an impairment affects a
18 claimant’s ability to work,” *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir.
19 1987).

20 The ALJ’s first reason for rejecting the opinion—that it was a “cursory

1 statement of disability without any supporting evidence”—is not legally sufficient.
2 Specifically, the ALJ focused on the lack of clinical findings on Nurse Petrie’s
3 examination in March 2016 as a reason to discredit the opinion. AR 69. A lack of
4 clinical findings on a standard check-the-box form provided by an “other source”
5 is not by itself a germane reason for discrediting the opinion. *Popa v. Berryhill*,
6 872 F.3d 901, 907 (9th Cir. 2017). Nurse Petrie expressed her opinion on a check-
7 the-box form on March 29, 2016. AR 806. In an examination report from the same
8 date, Nurse Petrie stated that Plaintiff was in no acute distress at the time of the
9 examination. Tr. 878. However, under the Ninth Circuit’s ruling in *Popa*, this
10 alone is insufficient to discredit the opinion.

11 The ALJ’s second reason for rejecting the opinion—that it was based on
12 Plaintiff’s subjective reporting—is not legally sufficient. “If a treating provider’s
13 opinions are based ‘to a large extent’ on an applicant’s self-reports and not on
14 clinical evidence, and the ALJ finds the applicant not credible, the ALJ may
15 discount the treating provider’s opinion.” *Ghanim v. Colvin*, 763 F.3d 1154, 1162
16 (9th Cir. 2014). “However, when the opinion is not more heavily based on a
17 patient’s self-reports than on clinical observations, there is no evidentiary basis for
18 rejecting the opinion.” *Id.* The court in *Ghanim* was discussing the opinion of a
19 treating acceptable medical source. *Id.* Here, the ALJ is addressing the opinion of a
20 treating “other source.” However, the ALJ failed to set forth how he concluded the

1 opinion was more heavily based on Plaintiff's subjective statements and not the
2 medical evidence. Therefore, without some explanation as to how the ALJ
3 concluded the opinion was based more heavily on Plaintiff's subjective reports, his
4 determination is not supported by substantial evidence.

5 The ALJ's third reason for rejecting the opinion—that it was unclear
6 whether the opinion included Plaintiff's failure to follow prescribed diabetic
7 treatment—is not legally sufficient. The ALJ focused on Plaintiff's failure to test
8 her blood sugar levels at the frequency prescribed by her providers. AR 69 (citing
9 AR 751-52, 756) (a February 2, 2014 appointment with Nurse Petrie in which
10 Plaintiff was testing her blood sugars only once per day); AR 748 (a June 24, 2015
11 appointment with Dr. Hamilton in which Plaintiff was testing her blood sugars 1.6
12 times per day and had an A1C of 9.6); AR 724 (a June 26, 2014 appointment with
13 Nurse Petrie in which Plaintiff reported testing 8.8 times a day and her A1C was
14 9.5% but was listed as non-compliant for failing to take her thyroid medication). A
15 review of the evidence demonstrates that when Plaintiff did test her blood sugar
16 levels more frequently, it did not result in improved A1C scores. As demonstrated
17 above, her A1C did not show a great deal of improvement when she was testing at
18 a range of 8.8 times a day or 1 time a day. Additionally, the record shows that in
19 October 2016 when she was testing at 3.9 times per day, her A1C continued to
20 range from 8% to 9%. AR 938. This is significant because she was being instructed

1 to test four times per day. AR 754. Therefore, despite following prescribed
2 treatment, she did not meet the goal of having an A1C below 7.5. AR 752. As
3 such, the ALJ's implication that Nurse Petrie's opinion is less valid because the
4 severity of Plaintiff's impairments would have decreased with more frequent blood
5 sugar testing is not supported by substantial evidence. Therefore, the ALJ erred in
6 weighing Nurse Petrie's opinion. The case is remanded for the ALJ to further
7 address the opinion.

8 **2. Guillermo Rubio, M.D., and Olegario Ignacio, Jr., M.D.**

9 Plaintiff challenges the significant weight the ALJ assigned to the opinions
10 of non-examining acceptable medical sources, Dr. Rubio and Dr. Ignacio. ECF No.
11 12 at 13-14.

12 The case is being remanded to further address the opinion of Nurse Petrie.
13 Therefore, the ALJ will readdress the medical opinions of Dr. Rubio and Dr.
14 Ignacio on remand.

15 **C. Plaintiff's Symptom Statements**

16 Plaintiff challenges the ALJ's treatment of her symptom statements. ECF No.
17 12 at 14-19.

18 The evaluation of a claimant's symptom statements and their resulting
19 limitations relies, in part, on the assessment of the medical evidence. *See* 20 C.F.R.
20 § 404.1529(c); S.S.R. 16-3p. Therefore, because the case is being remanded for the

1 ALJ to readdress the medical source opinions in the file, a new assessment of
2 Plaintiff's subjective symptom statements will be necessary.

3 **D. Step Four**

4 Because the ALJ erred in his step two determination and in weighing the
5 medical opinions in the record, a new residual functional capacity determination will
6 need to be made. Therefore, a new step four determination is also required upon
7 remand. 20 C.F.R. § 404.1520(a)(4)(iv).

8 **VIII. REMEDY**

9 Plaintiff asks the Court to apply the credit-as-true rule and remand this case
10 for an immediate award of benefits. ECF No. 12 at 2, 13.

11 The decision whether to remand for further proceedings or reverse and
12 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
13 888 F.2d 599, 603 (9th Cir. 1989). Under the credit-as-true rule, where (1) the
14 record has been fully developed and further administrative proceedings would
15 serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons
16 for rejecting evidence, whether claimant testimony or medical opinion; and (3) if
17 the improperly discredited evidence were credited as true, the ALJ would be
18 required to find the claimant disabled on remand, the Court remands for an award
19 of benefits. *Revels v. Berryhill*, 874 F.3d 648, 668 (9th Cir. 2017). But where there
20 are outstanding issues that must be resolved before a determination can be made,

1 and it is not clear from the record that the ALJ would be required to find a claimant
2 disabled if all the evidence were properly evaluated, remand for further
3 proceedings is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th
4 Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

5 In this case, it is not clear from the record that the ALJ would be required to
6 find Plaintiff disabled if all the evidence were properly evaluated. Further
7 proceedings are necessary for the ALJ to properly address Plaintiff's medically
8 determinable impairments at step two, to properly consider all the medical
9 opinions in the record, to properly consider Plaintiff's symptom statements, to
10 make a new residual functional capacity finding, and to make a new determination
11 at step four. Additionally, the ALJ will supplement the record with any outstanding
12 evidence and call medical and vocational experts to testify at a remand hearing.

13 IX. ORDER

14 Accordingly, **IT IS ORDERED:**

- 15 1. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is **GRANTED**
16 **in part.**
- 17 2. Defendant's Motion for Summary Judgment, **ECF No. 14**, is **DENIED.**
- 18 3. This matter is **REMANDED** to the Commissioner for further
19 proceedings consistent with this Order.

20 ///

1 4. Judgment shall be entered in favor of Plaintiff and the file shall be
2 **CLOSED.**

3 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
4 Order, forward copies to counsel, and **close the file.**

5 **DATED** this 7th day of January, 2020.

6 *s/Robert H. Whaley*
7 ROBERT H. WHALEY
 Senior United States District Judge